

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JASON PIERCE,

Plaintiff

v.

TONY MARCONATO, et al.,

Defendants

Case No.: 3:24-cv-00085-MMD-CSD

**Order**

Re: ECF Nos. 1, 1-1

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1).

**I. IFP APPLICATION**

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

The Local Rules of Practice for the District of Nevada provide: “Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

“[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

1 An inmate submitting an application to proceed IFP must also “submit a certificate from  
2 the institution certifying the amount of funds currently held in the applicant’s trust account at the  
3 institution and the net deposits in the applicant’s account for the six months prior to the date of  
4 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been  
5 at the institution for less than six months, “the certificate must show the account’s activity for  
6 this shortened period.” LSR 1-2.

7 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount  
8 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an  
9 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly  
10 deposits or the average monthly balance for the six-month period immediately preceding the  
11 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,  
12 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s  
13 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody  
14 of the prisoner will forward payments from the prisoner’s account to the court clerk each time  
15 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

16 Plaintiff’s certified account statement indicates that his average monthly balance for the  
17 last six months was \$103.94, and his average monthly deposits were \$305.40.

18 Plaintiff’s application to proceed IFP is granted. Plaintiff is required to pay an initial  
19 partial filing fee in the amount of \$61.08 (20 percent of \$305.40). Thereafter, whenever his  
20 prison account exceeds \$10, he must make monthly payments in the amount of 20 percent of the  
21 preceding month’s income credited to his account until the \$350 filing fee is paid.

## II. SCREENING

### A. Standard

Under the statute governing IFP proceedings, “the court shall dismiss the case at any time if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

In addition, under 28 U.S.C. § 1915A, “[t]he court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). In conducting this review, the court “shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a complaint under these statutes, the court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

The court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*,

1 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less  
2 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9  
3 (1980) (internal quotation marks and citation omitted).

4 A complaint must contain more than a “formulaic recitation of the elements of a cause of  
5 action,” it must contain factual allegations sufficient to “raise a right to relief above the  
6 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading  
7 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]  
8 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a  
9 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at  
10 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

11 A dismissal should not be without leave to amend unless it is clear from the face of the  
12 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
13 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
14 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

## 15 **B. Plaintiff’s Complaint**

16 Plaintiff’s complaint names as defendants Reno Police Department (RPD) Detective  
17 Tony Marconato, as well as Washoe County and RPD. (ECF No. 1-1 at 2.) In his first claim,  
18 Plaintiff alleges that on January 17, 2023, Detective Marconato caused him severe bodily injury  
19 by using excessive force during his arrest when he was restrained on the ground and Detective  
20 Marconato kicked him in the head four times and hit Plaintiff with his fist. (ECF No. 1-1 at 2-3.)  
21 In his second claim, Plaintiff alleges there were a number of detectives and RPD and SPD  
22 (presumably referring to Sparks Police Department) that should have intervened to stop the  
23 assault.

1  
2 While he references the Eighth and Fourteenth Amendments, Plaintiff asserts a claim that  
3 Detective Marconato used excessive force against him during his arrest, and that unidentified law  
4 enforcement officers failed to intervene, and these claims are governed by the Fourth  
5 Amendment. *See Graham v. Connor*, 490 U.S. 386, 395 (1989) (claims of excessive force during  
6 an arrest or other seizure of a free citizen are evaluated under the Fourth Amendment and apply  
7 an “objective reasonableness” standard); *see also Peck v. Montoya*, 51 F.4th 877, 888-89 (9th  
8 Cir. 2022) (“In some situations, the Constitution may impose on an officer a duty to intervene to  
9 prevent an ongoing constitutional violation.”)

10 Plaintiff may proceed with his Fourth Amendment excessive force claim against  
11 Detective Marconato.

12 Plaintiff may seek leave to amend to proceed against Doe defendants on his claim of  
13 failure to intervene in the alleged use of excessive force once he discovers the identity of those  
14 defendants. Leave to amend must be sought within the parameters of any applicable scheduling  
15 order deadlines.

16 Plaintiff also names Washoe County and RPD, and mentions SPD in the body of the  
17 complaint. With respect to RPD and SPD, a public agency is not a person or entity subject to suit  
18 unless that agency is a separate legal entity. *Hervey v. Estes*, 65 F.3d 784, 791-92 (9th Cir. 1995).  
19 Applying Federal Rule of Civil Procedure 17(b), the Ninth Circuit has held that state law  
20 determines the issue of whether a department of a municipality may sue or be sued. *See e.g.*  
21 *Streit v. County of Los Angeles*, 236 F.3d 552, 565 (9th Cir. 2001).

22 In Nevada, each county (or incorporated city or town within the county) is a political  
23 subdivision of the state and an independent legal entity, which means it can sue or be sued. *See*

1 *Clark County v. Lewis*, 88 Nev. 254, 498 P.2d 363, 365 (Nev. 1972); Nevada Revised Statute  
2 (NRS) 280.080; NRS 41.0305. A department of a county, city or town, however, "may not, in the  
3 department name, sue or be sued" without statutory authorization. *See Wayment v. Holmes*, 912  
4 P.2d 816, 819, 112 Nev. 232, 238 (Nev. 1996).

5 While the City of Reno the City of Sparks, or Washoe County may be proper parties,  
6 municipalities may be only be liable for the infringement of constitutional rights under certain  
7 circumstances. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978). "[M]unicipalities  
8 may be liable under § 1983 for constitutional injuries pursuant to (1) an official policy; (2) a  
9 pervasive practice or custom; (3) a failure to train, supervise or discipline; or (4) a decision or act  
10 by a final policymaker." *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 602-03 (9th  
11 Cir. 2019). A municipality may not, however, be sued under a *respondeat superior* theory  
12 because it employed an alleged wrongdoer. *Id.* at 603. "A plaintiff must therefore show  
13 *deliberate* action attributable to the municipality [that] directly caused a deprivation of federal  
14 rights." *Id.* (citation and quotation marks omitted, emphasis original).

15 "To impose liability on a municipality under Section 1983, a plaintiff must prove: "(1)  
16 [the plaintiff] had a constitutional right of which he was deprived; (2) the municipality had a  
17 policy; (3) the policy amounts to deliberate indifference to [the plaintiff's] constitutional right;  
18 and (4) the policy is the moving force behind the constitutional violation." *Gordon v. County of*  
19 *Orange*, 6 F.4th 961, 973 (9th Cir. 2021) (*Gordon II*) (internal quotation marks and citation  
20 omitted).

21 RPD and Washoe County, as well as SPD to the extent Plaintiff intended to include it as a  
22 defendant, will be dismissed with leave to amend to assert, if appropriate, a municipal liability  
23

1 claim against the City of Reno, City of Sparks and/or Washoe County in conformity with the  
2 legal authority for suing a city or county set forth above.

### 3 4 **III. CONCLUSION**

5 (1) Plaintiff's IFP application (ECF No. 1) is **GRANTED**; however, within **30 DAYS**  
6 Plaintiff must pay, through NDOC, an initial partial filing fee in the amount \$61.08. Thereafter,  
7 whenever his prison account exceeds \$10, he is required to make monthly payments in the  
8 amount of 20 percent of the preceding month's income credited to his account until the full \$350  
9 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful.  
10 The Clerk must **SEND** a copy of this Order to the attention of **Chief of Inmate Services for the**  
11 **Nevada Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

12 (2) The Clerk will **FILE** the complaint (ECF No. 1-1).

13 (3) The complaint will **PROCEED** with a Fourth Amendment excessive force claim  
14 against defendant Detective Marconato.

15 (4) Plaintiff may seek leave to amend to assert a Fourth Amendment failure to intervene  
16 claim under the Fourth Amendment against the Doe defendants once those defendants have been  
17 identified. Leave to amend shall be sought within the parameters of any applicable scheduling  
18 order deadlines.

19 (5) Washoe County and RPD are **DISMISSED WITH LEAVE TO AMEND**.

20 The Complaint is **DISMISSED WITH LEAVE TO AMEND**. Plaintiff has **30 DAYS**  
21 from the date of this Order to file an amended complaint correcting the deficiencies with respect  
22 to Washoe County and RPD noted above. Alternatively, he may file a notice to the court within  
23 **30 DAYS** that indicates he only wishes to proceed against Detective Marconato (though he may

1 still seek leave to amend later, in accordance with any scheduling order deadlines, to pursue a  
2 claim against the Doe defendants he has identified or against the City of Reno, City of Sparks or  
3 Washoe County). Any amended complaint must be complete in and of itself without referring or  
4 incorporating by reference any previous complaint. Any allegations, parties, or requests for relief  
5 from a prior complaint that are not carried forwarded in the amended complaint will no longer be  
6 before the court. Plaintiff shall check the box for the first amended complaint on the court's form  
7 civil rights complaint. If Plaintiff fails to file an amended complaint within the 30 days, the  
8 action will proceed with the Fourth Amendment claim against detective Marconato.

9 (6) The Clerk of Court shall **ISSUE** a summons for defendant Tony Marconato, and  
10 **deliver the same**, to the U.S. Marshal for service. The Clerk also shall also **SEND** sufficient  
11 copies of the complaint and this Order to the U.S. Marshal for service on defendant Marconato.  
12 The Clerk shall **SEND** to Plaintiff a USM-285 form. Plaintiff will have **21 days** within which to  
13 furnish to the U.S. Marshal the required USM-285 forms with relevant information for the  
14 defendant on each form at 400 S. Virginia Street, 2nd floor, Reno, Nevada 89501. Within **20**  
15 **days** after receiving from the U.S. Marshal a copy of the USM-285 forms showing whether  
16 service has been accomplished, if any of the defendants were not served, and if Plaintiff wants  
17 service to be attempted again, he must file a motion with the court providing a more detailed  
18 name and/or address for service, or indicating that some other method of service should be  
19 attempted.

20 (7) Under Federal Rule of Civil Procedure 4(m), service on defendant Marconato must be  
21 completed within **90 days** of the date of this Order. If Plaintiff requires additional time to meet  
22 any of the deadlines set by the court, he must file a motion for extension of time under Local  
23 Rule 1A 6-1 *before* the expiration of the deadline, and the motion must be supported by a

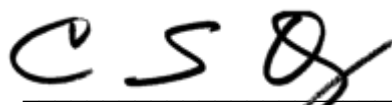


1 showing of good cause. A motion filed after a deadline set by the court or applicable rules will  
2 be denied absent a showing of excusable neglect.

3 (8) Plaintiff shall serve upon any defendant or, if an appearance has been entered by  
4 counsel, upon the attorney(s), a copy of every pleading, motion or other document submitted for  
5 consideration by the court. If Plaintiff electronically files a document with the court's electronic  
6 filing system, no certificate of service is required. Fed. R. Civ. P. 5(d)(1)(B); LR IC 4-1(b); LR  
7 5-1. If Plaintiff mails the document to the court, Plaintiff shall include with the original  
8 document submitted for filing a certificate stating the date that a true and correct copy of the  
9 document was mailed to the defendants or counsel for the defendants. If counsel has entered a  
10 notice of appearance, Plaintiff shall direct service to the individual attorney named in the notice  
11 of appearance, at the physical or electronic address stated therein. The court may disregard any  
12 document received by a district judge or magistrate judge which has not been filed with the  
13 Clerk, and any document received by a district judge, magistrate judge, or the Clerk which fails  
14 to include a certificate showing proper service when required.

15  
16 **IT IS SO ORDERED.**

17  
18 Dated: April 11, 2024



Craig S. Denney  
United States Magistrate Judge